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State responsibility

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments

Argentina

General observations

The Argentine Republic warmly welcomes the considerable progress made on this important topic and hopes that the Commission will manage to complete the second reading at its fifty-third session.

The Argentine Government is convinced that the draft articles submitted to the General Assembly for consideration at its fifty-fifth session are close to the final product, with only a few minor technical and streamlining adjustments to be made.

This is a balanced and realistic draft codifying the general rules governing responsibility for wrongful acts by States, and also containing elements of progressive development in directions which the Argentine Government considers appropriate on the whole.

Specifically, the draft has made adequate progress on two of the most controversial and sensitive topics: the question of so-called "State crimes" and the rules governing countermeasures.

Part One
The internationally wrongful act of a State

Chapter II
The act of the State under international law

Article 8
Attribution to the State of the conduct of organs placed at its disposal by another State

This article presents no major problems as it stands. Some doubts could arise, however, concerning the position of a State that places one of its organs at the disposal of the offending State. It might therefore be useful to stipulate at the beginning of the article that its provisions are without prejudice to the application of chapter IV (Responsibility of a State in respect of the act of another State). That would make it clear that the State "lending" one of its organs would be responsible for the wrongful act only to the extent that the requirements of that chapter are met.

Chapter IV
Responsibility of a State in respect of the act of another State

Article 16, subparagraph (a), article 17, subparagraph (a), and article 18, subparagraph (b), stipulate that in order for a State to be responsible in respect of the act of another State, the State aiding, assisting, directing, controlling or coercing another State in the commission of the wrongful act must do so with knowledge of the circumstances of the act. This introduces a "subjective element" that seems prima facie to be incompatible with the general rules in the preceding chapters. There is, however, clearly some merit in the idea behind this "subjective"

requirement: to limit the number of potential author States "participating" in the wrongful act, which otherwise could increase indefinitely.

Article 16
Aid or assistance in the commission of an internationally wrongful act

(*See general comments on chapter IV, and article 18*)

Article 17
Direction and control exercised over the commission of an internationally wrongful act

(*See general comments on chapter IV, and article 18*)

Article 18
Coercion of another State

This article, covering the situation of a State which coerces another State to commit an internationally wrongful act, calls for two comments. First, the Commission seems to have in mind cases where the coerced State is in a situation of *force majeure* (art. 24) as a result of that coercion.[1] However, a more realistic scenario would be one in which coercion creates a situation of distress — if the object of the coercion is an individual (art. 25) — or a state of necessity (art. 26). In fact, domestic legal provisions usually distinguish between *force majeure* (absolute force, created exclusively by acts of nature) and coercion (relative or coercive force, resulting from human action).

Secondly, there is a difference with regard to articles 16 and 17, dealing respectively with aid or assistance and direction and control in the commission of a wrongful act by another State. The difference derives from the fact that, under articles 16 and 17, the State participating in the wrongful act must be bound by the primary norm violated by the State directly committing the wrongful act. In the case of coercion, on the other hand, the coercing State would be internationally responsible even where the act, had it been committed by the coercing State itself, was not wrongful.

On the basis of the premise that a State may exert "lawful coercion",[2] there could be a situation where a State exerting "lawful coercion" on a State caused it to violate a norm by which the coercing State was not bound. In such a situation, the coercing State, while exerting "lawful coercion" — in other words, engaging in conduct not prohibited per se by international law — and while not being bound by the violated norm, would be internationally responsible under article 18.

There is no justification for the difference in treatment between articles 16 and 17 on the one hand, and article 18 on the other, except for the intuitive notion that coercion is more "serious" than assistance or direct control. But if, as was stated earlier, coercion may be "lawful", it is unclear why it should be subject to a stricter regime.

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[1] See A/CN.4/498/Add.1, para. 202, and *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* and corrigenda (A/54/10 and Corr.1 and 2), para. 268.

[2] A/CN.4/498/Add.1, para. 205.

There is a practical reason:[3] namely that the State that becomes an offending State as a result of the coercion could probably invoke coercion as a circumstance precluding wrongfulness. The affected State should therefore be given an opportunity to obtain reparation from the coercing State. The Argentine Government supports that position, inasmuch as the coercing State would not be able to seek refuge in an abuse of the law.

Subparagraph (b)

(*See general comments on chapter IV*)

Article 19
Effect of this Chapter

(*See general comments on Part Four*)

Chapter V
Circumstances precluding wrongfulness

Article 24
Force majeure

(*See article 18*)

Article 27
Consequences of invoking a circumstance precluding wrongfulness

(*See article 33 and general comments on Part Four*)

Part Two
Content of international responsibility of a State

Chapter I
General principles

Article 31
Reparation

In Part Two of the draft articles there is a conspicuous lack of regulation on the question of the causal link between the wrongful act and the damage subject to reparation. Only article 37, paragraph 2, in making a brief mention of loss of profits, offers any criterion regarding the extent of the damage subject to reparation. However, the problem, although usually addressed in connection with the obligation to compensate, is one that arises from the obligation to make reparation in general.

Any regime of responsibility should offer criteria for determining the causal link between the wrongful act and the consequences subject to reparation. Otherwise, there would be no way of setting a time limit or a logical limit on the consequences of the wrongful act.

[3] See A/CN.4/498/Add.1, para. 202, and *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* and corrigenda (A/54/10 and Corr.1 and 2), para. 273.

Article 31 seems too broad, since no distinction is drawn between direct or proximate consequences and indirect or remote consequences. Since such a distinction is firmly rooted in international practice, there is no reason not to include a reference to it in paragraph 2 of article 31 or at least in the commentary to the article.

Article 33
Other consequences of an internationally wrongful act

It is not clear why former article 37 on *lex specialis* was moved to Part Four, while former article 38, now article 33, was left in Part Two (see general comments on Part Four).

The wording of article 33 refers to the content of Part Two, but the problem addressed by the article is broader in scope. In effect, article 33 allows for the existence of rules of general international law that may be applicable even though they are not expressly mentioned in the draft articles. Such rules may exist in relation to aspects of international responsibility other than the question of the legal consequences of the wrongful act (for instance, it is conceivable that there may be grounds for precluding wrongfulness other than those stipulated in Part One, as article 27 now indicates). Therefore, if it is thought necessary to include this provision, it should be placed in Part Four (perhaps as paragraph 2 of article 56).

It should be noted that former articles 37 and 38, despite their similarity, refer to different situations. Whereas former article 37 provided that the draft articles would not apply where special rules of international law existed, former article 38 provided for just the opposite situation by preserving the applicability of general rules not set out in the articles, or perhaps developed subsequent to their adoption.

It is true that in its current wording article 33 does not appear to go beyond what is stated in the current article 56. For that reason, it might be preferable to retain the wording of former article 38, which makes explicit reference to customary law.

Article 34
Scope of international obligations covered by this Part

Paragraph 2

(*See general comments on Part Four*)

Chapter II
The forms of reparation

Article 35
Forms of reparations

Some have criticized chapter II as being too restrictive in its wording, which appears to favour the automatic application of the rules of reparation. For the sake of greater flexibility, it might be helpful to insert the phrase "without prejudice to the right of the parties to agree on other modalities of reparation" at the beginning of the article.

Article 37
Compensation

(*See article 31*)

Chapter III
Serious breaches of essential obligations to the international community

The Argentine Republic has supported the need to recognize the existence of a category of particularly serious breaches by a State of its essential obligations to the international community as a whole, over and beyond the terminology adopted. In this connection, the omission of the term "crime" from the current wording of article 41 appears to be a positive sign, since the term lent itself to conceptual confusion, as stated by Argentina in 1998.[4]

The threefold distinction between *erga omnes* norms, *jus cogens* norms and serious breaches represents an acceptable vision of the international legal system in its current state of development. From that standpoint, the draft articles accurately reflect that distinction.

As was stated at the fifty-fifth session of the General Assembly, just as important as or even more important than the inclusion of a differentiated regime of responsibility in accordance with the seriousness of the wrongful act would be adequate implementation and reflection of such a regime in the articles. In the opinion of the Argentine Government, the system envisaged in Part Two, chapter III, is, on the whole, appropriate and precise.

Article 41
Application of this Chapter

(*See general comments on chapter III*)

Article 42
Consequences of serious breaches of obligations to the international community as a whole

Paragraph 1

To avoid confusion, the phrase "in addition to the consequences set out in Part Two of these articles" could be inserted at the beginning of the paragraph.

[4] A/CN.4/488/Add.1, p. 6.

Part Two bis
The implementation of State responsibility

Chapter I
Invocation of the State responsibility of a State

Article 49
Invocation of responsibility by States other than the injured State

Argentina welcomes the establishment of a distinction between the State or States directly injured by an internationally wrongful act and other States that may have an interest in enforcing the obligation breached. Article 49 defines cases in which a State other than the State directly affected may invoke the international responsibility of another State, as well as the conditions governing such invocation (specifically, the right of the State to seek cessation of the wrongful act, and guarantees of non-repetition). This is a reasonable solution.

Paragraph 1

Paragraph 1 (a) of the article entitles a State other than the injured State to invoke the responsibility of another State if "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest". Since any multilateral treaty can establish, to one degree or another, a "collective interest", the Government of Argentina believes it would be helpful for the Commission to offer additional clarification regarding this concept, in order to facilitate the interpretation and application of the article in practice.

Chapter II
Countermeasures

In 1998 Argentina stated that "the taking of countermeasures should not be codified as a *right* normally protected by the international legal order, but as an act merely *tolerated* by the contemporary law of nations" in exceptional cases.[5] In this connection, the treatment of the topic in Part Two bis, chapter II, sets limits and conditions on this concept that are in principle acceptable, inasmuch as it makes clear the exceptional nature of countermeasures and specifies the procedural and substantive conditions relating to resort to countermeasures.

As for the logical place for rules on this topic, some have even suggested excluding the question of countermeasures. While from a purely theoretical standpoint there may be some merit in not including this question, there is no doubt that, in the current state of international law, countermeasures represent one of the means of giving effect to international responsibility. Against that background, the Argentine Republic thinks it would be useful to include precise rules within the draft articles, as contained in Part Two bis, chapter II, so as to minimize the possibility of abuses.

[5] Ibid., p. 7.

Article 53
Conditions relating to resort to countermeasures

Paragraph 3

Paragraph 2 provides that "the injured State shall notify the responsible State of any decision to take countermeasures, and offer to negotiate with that State". However, paragraph 3 states that, notwithstanding, "the injured State may take such provisional and urgent countermeasures as may be necessary to preserve its rights". Since such provisional countermeasures are subject to fewer procedural requirements than other countermeasures, there is a risk that they will be used as a subterfuge to elude those requirements. Therefore it would be advisable for the Commission to try to restrict the circumstances that would entitle a State to take provisional countermeasures, and in particular to set some sort of time limit, which is lacking in the current wording of the article.

Article 54
Countermeasures by States other than the injured State

It should be pointed out that rules on collective countermeasures should be even stricter than those on bilateral countermeasures. Inclusion of the former in the draft articles may be regarded as progressive development and would call for further attention and consideration.

Part Four
General provisions

(*See article 33*)

Part Four contains, among other things, some "saving clauses" regarding the relationship between the draft articles and other legal regimes.

However, other saving clauses can also be found in other parts of the draft articles (for example, in article 19, article 27, paragraphs 1 and 2, article 33 and article 34, paragraph 2). Although some of these clauses are directly related to the part in which they are found, many of them could be formulated in such a way as to apply to the draft articles as a whole, in which case they would be better placed in Part Four.

Article 56
Lex specialis

(*See article 33*)

The article appears to be too restrictive in its wording. As it stands, it might exclude the possibility that the articles would apply as a residual regime if a special regime exists. In the opinion of the Government of Argentina, the draft articles should have residual application in all special legal regimes, unless the latter expressly state the contrary. Otherwise, much of the practical impact of the draft articles would be lost. It would therefore be desirable to come up with a more flexible wording for the article.